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No. 85-50

SUPREME COURT OF THE UNITED STATES

October Term, 1985

GEORGE P. SHULTZ, SECRETARY OF STATE,

Petitioner,

v.

ALISON PALMER, et al.

GEORGE P. SHULTZ, SECRETARY OF STATE,

Petitioner,

v.

MARGUERITE COOPER, et al.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the District of Columbia Circuit

BRIEF IN OPPOSITION TO THE PETITION FOR A WRIT OF CERTIORARI

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STATEMENT OF THE CASE

Respondents adopt petitioner's statement of the case, noting only that

the issue in this case is similar to the question presented in the pending petition for certiorari in Library of Congress v. Shaw, No. 85-54.

The question presented here is whether Section 706(k) of the Civil Rights Act of 1964, 42 U.S.C. 2000e-5(k), which makes the United States liable for "a reasonable attorney's fee * * * the same as a private person," waives the government's sovereign immunity so as to permit the calculation of an attorney's fee award against the United States on the basis of the attorney's current hourly rates. The question presented by the petitioner in Library of Congress v. Shaw is whether this same section waives the government's immunity against the payment of interest on attorney's fees awards.

REASONS FOR DENYING THE WRIT

SUMMARY

Respondents submit that the petition should be denied for two reasons!

First, for the reasons stated by respondent in his brief in opposition to the petition for a writ of certiorari in Library of Congress v. Shaw, the clear intent of Congress was to enact a complete waiver of the sovereign immunity of federal agencies in cases brought under Title VII of the Civil Rights of 1964. Consequently, the relief obtainable, including the amount of attorney's fees, against a federal agency in such cases is the same as that obtainable against all other employers.

Second, even assuming arguendo that Congress did not waive sovereign immunity as to interest on attorney's fee awards under Title VII, Congress clearly waived that immunity as to a "reasonable

attorney's fee." 42 U.S.C. 2000e-5(k). The courts of appeals have uniformly construed a "reasonable attorney's fee" to include an adjustment for delay in payment, and the use of current rates is one method of accounting for that delay.

ARGUMENT

A. SECTION 706(k) IS A COMPLETE WAIVER OF SOVEREIGN IMMUNITY

In his brief in opposition to the petition for a writ of certiorari in Library of Congress v. Shaw, respondent demonstrates that the clear intent of Congress was to enact a complete waiver of the sovereign immunity of federal agencies in cases brought under Title VII of the Civil Rights of 1964. Respondents here adopt the arguments of respondent in that case.

Consequently, the relief obtainable, including the amount of attorney's fees, against a federal agency in Title

VII cases is the same as that obtainable against all other employers. To compensate for delay in payment of those fees, the fee award for other employers may be adjusted either by adding interest or by using current hourly rates. Since the relief which may be obtained against federal employers is the same, courts may award attorney's fees when the government is the employer by adding interest or by using current rates.

B. EVEN ASSUMING ARGUENDO THAT SECTION 706(k) DOES NOT WAIVE SOVEREIGN IMMUNITY AS TO INTEREST, IT CLEARLY WAIVES SOVEREIGN IMMUNITY AS TO THE USE OF CURRENT HOURLY RATES

Petitioner argues that "there is no difference, for sovereign immunity purposes, between pure interest and the use of current rates (or any other delay adjustment to the lodestar) * * *." Pet. 6. It contends that, because both interest and current rates compensate

the recipient for delay in payment for services, both "must receive the same treatment for sovereign immunity purposes * * *." Id. at 7.

Respondents agree that both interest and current rates are used to adjust for delay in receipt of payment. However, it does not follow from this conclusion that the use of current rates is barred by sovereign immunity to the same extent as an award of interest.

Section 706(k) authorizes "a reasonable attorney's fee" as part of costs, and provides that the United States "shall be liable for costs the same as a private person." 42 U.S.C. 2000e-5(k)(1982). Judge Ginsburg, dissenting in Shaw v. Library of Congress, 747 F.2d 1469, 1488 (D.C. Cir. 1984), recognized that a waiver of immunity as to "costs" may not include a waiver of

immunity as to interest on those costs, because "in federal adjudication, the word 'costs' has never been understood to include any interest component." 747 F.2d at 1488. In contrast, in many federal cases, the words "reasonable attorney's fee" have commonly been understood to include an adjustment for delay in payment, and the use of current rates is one common method for accounting for that delay.

This Court held in Hensley v. Eckerhart, 103 S. Ct. 1933, 1940 (1983), that while the "product of reasonable hours times a reasonable rate" normally provides a "reasonable" attorney's fee within the meaning of a similar statute (42 U.S.C. 1988), "there remain other considerations that may lead the district court to adjust the fee upward or downward * * *." This Court reaffirmed

this holding in Blum v. Stenson, 104 S. Ct. 1541, 1548 (1984):

> The statute [42 U.S.C. 1988] requires a "reasonable fee," and there may be circumstances in which the basic standard of reasonable rates multiplied by reasonably expended hours results in a fee that is either unreasonably low or unreasonably high.

The courts of appeals have uniformly recognized that the use of historic hourly rates in protracted cases, without any adjustment for delay, often does not produce a "reasonable fee." Murray v. Weinberger, 741 F.2d 1423, 1432-1434 (D.C. Cir. 1984); Graves v. Barnes, 700 F.2d 220, 224 (5th Cir. 1983); Gautreaux v. Chicago Housing Authority, 690 F.2d 601, 612 (7th Cir. 1982); Jorstad v. IDS Realty Trust, 643 F.2d 1305, 1313 (8th Cir. 1981); Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983); Johnson v. University of Alabama,

706 F.2d 1205, 1210 (11th Cir. 1983), certiorari denied, 104 S. Ct. 489 (1983). "Such delay obviously dilutes the eventual award and may convert an otherwise reasonable fee into an unreasonably low one." Johnson v. University of Alabama, supra, 706 F.2d at 1210.

Historic rates are established for fee-paying clients, not for court-awarded fees, and are based on the assumption that clients will pay their bills promptly. Copeland v. Marshall, 641 F.2d 880, 893 (D.C. Cir. 1980). A law firm generally does not establish its rates with the expectation that payment will be received many years after the services are provided. Otherwise, they would undoubtedly increase their hourly rates to account for that delay. As Judge Ginsburg stated in Shaw v. Library of Congress, supra, 747 F.2d

at 1485, "an attorney embarking on services for which he or she anticipates payment ultimately, but not promptly, may factor in the expected delay." On the other hand, current hourly rates are used to "approximate the value today of the historic rates charged at the time when the legal services actually were rendered." Murray v. Weinberger, supra, 741 F.2d at 1433.

Consequently, current rates, unlike interest, are not used to add to a "reasonable attorney's fee." Instead, they are used to arrive at a "reasonable attorney's fee." The use of current hourly rates therefore is not inconsistent with the "no-interest" rule. On the contrary, a prohibition on the use of current hourly rates would be inconsistent with the statutory requirement of a "reasonable attorney's fee."

CONCLUSION

For the foregoing reasons, the petition should be denied. In the alternative, the petition should be held for disposition in light of Library of Congress v. Shaw.

Respectfully submitted,

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